



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Virginia Law Register

VOL. VIII.]

APRIL, 1903.

[No. 12.]

LIMITATION OF CARRIER'S COMMON LAW LIABILITY IN BILLS OF LADING.

AT common law, a public carrier is an insurer of the articles committed to his care, and as such is liable for any loss or damage to the same, other than by act of God, the law, the public enemy, the act of the shipper, or of an inherent vice in the article shipped.

As live-stock was not originally a subject of transportation by land, there was formerly some controversy as to whether or not a carrier of such property was subject to the common law liability;¹ but with the exception of those of Michigan, the American courts hold that the rule with respect to live-stock is the same as that applicable to other property.²

This rule was founded on considerations of public policy for the protection of the shipper against loss by collusion of the carrier with highwaymen, the clandestine doing away with the property, and the impossibility of discovering the fraud under the conditions existing in England at the time the rule had its origin.³

Such being the foundation of the liability, some of the early decisions did not sanction any contract whereby the carrier undertook to limit it.⁴

But the common law doctrine being considered a harsh one, and the necessity for its adoption having greatly diminished under modern conditions of society, it was soon repudiated by the Supreme Court of the United States,⁵ and the decision of that

¹ *McManus v. Lancashire etc. R. Co.*, 2 H. & N. 693; *Pardington v. Railroad Co.*, 1 H. & N. 392; *Michigan etc. R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore R. Co. v. Perkins*, 25 Mich. 329; *Louisville etc. v. R. Co. v. Hedger*, 9 Bush. 645; *Indianapolis etc. R. Co. v. Jurey*, 8 Ill. App. 160.

² *Hutchinson on Carriers*, sec. 217 *et seq.*; *Maslin v. B. & O. R. Co.*, 14 W. Va. 180; *Evans v. Railroad Co.*, 111 Mass. 142.

³ *Coggs v. Bernard*, 2 Ld. Raymond 909; *Va. & Tenn. R. Co. v. Sayers*, 26 Gratt. 333.

⁴ *Va. & Tenn. R. Co. v. Sayers*, *supra*; *Southcote's Case*, 4 Coke, 835; *Gould v. Hill*, 2 Hill, 623; *Fish v. Chapman*, 2 Ga. 349; *Jones v. Voorheis*, 10 Ohio, 146.

⁵ *New Jersey Steam Nav. Co. v. Mchts. Bank*, 47 U. S. 344.

court, establishing the right of the carrier to limit his common law liability to a reasonable extent, not incompatible with a sound public policy, was soon followed by nearly all the State courts, and the doctrine may now be considered as well settled.⁶

LIABILITY OF CARRIER FOR LOSS ON CONNECTING LINES.

Though at one time a subject of some conflict of authority, it is now held by the Supreme Court of the United States, and by a majority of State courts, that at common law the carrier is not bound to accept articles for transportation to a point beyond the terminus of its own line; and if it does so, it may impose such terms as are agreed upon.⁷

In Virginia, however, it is provided by statute that a common carrier accepting goods for transportation to a point beyond the terminus of its own line, cannot relieve itself from liability occurring beyond such terminus, unless it be released by contract signed by the owner or his agent; and unless, also, it furnish the consignor, within a reasonable time after demand, satisfactory proof that the loss or injury did not occur while the goods were in its charge.⁸

SHIPPER'S ASSENT NECESSARY.

As the shipper has a right to insist that the carrier accept and carry the goods at the lawful rate under his responsibility at common law, and the carrier is liable to him for a refusal to do so,⁹ it follows that any contract whereby the carrier seeks to limit his common law responsibility must be made with the assent of the shipper. This assent, however, by the current of authority, need not always be expressed, but may be implied by the acceptance of the bill of lading by the shipper; and such acceptance without objection, and in the absence of statutory provision to the contrary,

⁶ Va. & Tenn. R. Co. v. Sayers, *supra*; So. Exp. Co. v. Caldwell, 88 U. S. 264; Maslin v. B. & O. R. Co., 14 W. Va. 180; South etc. R. R. v. Henlein, 52 Ala. 606; Georgia R. Co. v. Beatie, 66 Ga. 438; Ill. & C. R. Co. v. Morrison, 19 Ill. 136; Dawson v. St. Louis & C. R. Co., 76 Mo. 514; Kimball v. Railroad Co., 26 Vt. 247; Belts v. Railroad Co., 21 Wis. 80.

⁷ N. & W. R. Co. v. Reeves, 97 Va. 284; McConnell v. N. & W. R. Co., 86 Va. 284; R. R. Co. v. Pratt, 22 Wall. 123; 3 Woods Railway Law, 1572, note 3; N. & W. R. Co. v. Sutherland, 89 Va. 703; Myrick v. R. R. Co., 107 U. S. 102.

⁸ Code of Virginia, sec. 1295; Va. C. & I. Co. v. L. & N. R. Co., 98 Va. 776; R. & A. R. Co. v. Patterson, 169 U. S. 311.

⁹ Code of Virginia, secs. 1200, 1201 and 2900; McMullen v. Railroad, 16 Mich. 111; Wehmann v. Railroad Co., 58 Minn. 22; Selby v. Wilmington & C. R. Co., 113 N. C. 588; Brown v. Adams Exp. Co., 15 W. Va. 812; Chicago & C. R. Co. v. Erickson, 91 Ill. 613; Ballentine v. North Mo. R. Co., 40 Mo. 491; Texas & C. R. Co. v. Nicholson, 61 Tex. 491.

will bind the shipper as effectually as if he had signed the bill of lading.¹⁰ Nor will the inability of the shipper to read the bill of lading (unless, indeed, the carrier knew of it when it was issued), or his failure to do so, alter the presumption of assent to its terms.¹¹

The bill of lading must have been issued and accepted at or before the time the goods are shipped; and the shipper's acceptance thereof afterwards, will not relieve the carrier from his common law liability.¹²

THE CONTRACT FOR A QUALIFIED LIABILITY MUST BE SUPPORTED BY A SUFFICIENT CONSIDERATION.

The mere acceptance of the goods by the carrier, and his agreement to carry them, are not of themselves a sufficient consideration for the shipper's assent to such a contract, since, as we have seen, the carrier is already under a legal obligation to transport at the rate prescribed by law under the common law liability, and the doing of what one is under a legal obligation to do is no consideration for a new agreement.¹³

The consideration usually stated in the bill of lading is a reduction of the regular rate of transportation. In the absence of evidence to the contrary, it is to be presumed that the rates for the carriage of goods are fixed with reference to the risk assumed. But where the rate charged is the maximum allowed by the charter of the carrier, if a corporation, or where a reduction of the usual rate is forbidden by act of Congress, the regulations of the Interstate Commerce Commission, or a State statute,¹⁴ an agreement to carry at the reduced rate, being in violation of the law, is void;¹⁵ and

¹⁰ *James v. Cin. & C. R. Co.*, 89 Ala. 376; *Black v. Wabash & C. R. Co.*, 111 Ill. 351; *Grace v. Adams*, 100 Mass. 505; *Hill v. Syracuse R. Co.*, 73 N. Y. 251; *Can v. Texas & C. R. Co.*, 118 Fed. 91.

¹¹ *MacMillen v. R. R. Co.*, 16 Mich. 79; *Mouton v. R. R. Co.*, 128 Ala. 537; *Railroad Co. v. Weakley*, 50 Ark. 397; *Michaletsche v. Wells, Fargo & Co.*, 118 Cal. 683; *Overland Mail & C. Co. v. Carrol*, 7 Colo. 43; *Cox v. Railroad Co.*, 170 Mass. 129; *N. Y. & C. R. Co. v. Sayles*, 87 Fed. 444.

¹² *Merchants & C. Transp. Co. v. Furthman*, 149 Ill. 66; *Gage v. Tirrell*, 91 Mass. 299; *Ill. Cent. R. R. v. Craig*, 102 Tenn. 298; *The Arctic Bird*, 109 Fed. 167.

¹³ *Clark on Contracts*, p. 184; *Keffer v. Grayson*, 76 Va. 517; *Southard v. Minn. & C. R. Co.*, 60 Minn. 382.

¹⁴ Under Art. XII, sec. 156 (b) of the Constitution of Virginia, all rates, charges or classifications inconsistent with those prescribed by the State Corporation Commission are declared to be "unlawful and void." As to freight rates on produce, etc., see Code of Virginia, sec. 1202, as amended by Acts of 1897-98, p. 850. As to express rates, see Code of Virginia, sec. 1215.

¹⁵ *Ward v. Miss. Pacific R. Co.*, 158 Miss. 226; *Southern R. Co. v. Wilcox*, 99 Va. 394; *Hancock v. R. R. Co.*, 145 U. S. 416; *Wight v. U. S.*, 167 U. S. 513.

hence there is no valid consideration for the agreement to limit the liability of the carrier. It may always be shown, notwithstanding a statement to the contrary in the bill of lading, that no reduction of rate was really made or allowed by law to be made, the statement of the bill of lading being only *prima facie* evidence of the fact of the rate being reduced.¹⁶

Assuming that the contract for a limited liability is made upon a sufficient consideration, and that the bill of lading was duly issued, delivered and accepted by the shipper, it does not follow even then that the contract for a limited liability will be sustained by the courts; for

THE LIMITATION MUST BE A REASONABLE ONE.

As the parties occupy obviously unequal positions in the matter of imposing terms upon each other, contracts whereby the carrier seeks to limit his responsibility beyond what is fair or reasonable, do not find favor with the courts.¹⁷ As was said by Mr. Justice Bradley in *Railroad Co. v. Lockwood*:¹⁸

"The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in the courts. His business will not admit of such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. If the customer had any real freedom of choice, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least), to the dictates of public policy and morality. The status and relative positions of the parties render any such conditions void.

¹⁶ *McFadden v. Miss. Pacific R. Co.*, 92 Miss. 343; *Ga. R. & C. Co. v. Reid*, 91 Ga. 377; *Baltimore & C. R. Co. v. Crawford*, 65 Ill. App. 113.

¹⁷ *Va. & Tenn. R. Co. v. Sayers*, *supra*; *Wilcox v. Penn. R. Co.*, 166 Pa. St. 184; *Southern Express Co. v. Caldwell*, 88 U. S. 264; *Mich. Cen. R. Co. v. Mineral Spring Mfg. Co.*, 83 U. S. 319; *Mitchell v. Carolina Central R. Co.*, 124 N. C. 226; *R. R. Co. v. Henlein*, 52 Ala. 606.

¹⁸ 17 Wall. 357.

Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of persons with whom they contract, must rest upon their fairness and reasonableness." ¹⁹

In accordance with this principle, it has been held as essential to freedom of choice that the

SHIPPER MUST HAVE THE OPTION OF SHIPPING UNDER THE
COMMON LAW LIABILITY.

If, therefore, the carrier force the shipper to contract for a limited liability by refusing to accept the goods under his common law liability, the contract so procured is void. A bill of lading containing limitations of liability, accepted under such circumstances, has been justly characterized as an "imposition of terms," rather than a contract.²⁰

THE CARRIER CANNOT BY CONTRACT LIMIT HIS RESPONSIBILITY BY
AN AGREEMENT THAT HE IS A PRIVATE, RATHER THAN A COM-
MON, CARRIER, IF HE BE A COMMON CARRIER IN FACT.

A common carrier may become a private one, or a bailee for hire, when, as a matter of accommodation, he undertakes to carry something which it is not his business to carry as a common carrier; but when the carrier has a regularly established business for carrying all or certain articles, and especially if the carrier be a corporation created for the carrying trade, and the carriage of articles be embraced within the scope of its chartered powers, it is a common carrier, subject to all the duties and responsibilities of such; and no special contract can divest it of that character. The facts, not the agreement of the parties, must show the nature of the carrier's business, whether public or private.²¹

In *Railroad Co. v. Lockwood*,²² Mr. Justice Bradley, after stating the doctrine to be that the carrier's liability exists by reason of his occupation, and not by virtue of the responsibility under which he rests, says:

"Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established

¹⁹ The reasonableness of the limitation is a question of law for the court. *N. & W. R. Co. v. Wysox*, 82 Va. 250.

²⁰ *R. R. Co. v. Cravens*, 57 Ark. 112; *R. R. Co. v. Spann*, 56 Ark. 127; *Knell v. U. S. & C. S. S. Co.*, 33 N. Y. Supp. 423; *Kimball v. Rutland & C. R. Co.*, 26 Vt. 247; 111. Cent. R. Co. v. Craig, 102 Tenn. 98.

²¹ *Hinkle v. R. R. Co.*, 126 N. C. 932; *Brown v. Adams, Exp. Co.*, 15 W. Va. 812; *Bank of Ky. v. Adams Express Co.*, 93 U. S. 174; *Railroad Co. v. Lockwood*, *supra*.

²² *Supra*.

for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels, and a private carrier as to the one?"²³

CARRIER CANNOT CONTRACT AGAINST HIS OWN NEGLIGENCE, OR
THAT OF HIS AGENTS OR SERVANTS.

Since the carrier cannot by contract diminish his responsibility as a public carrier by calling himself a private one, it follows that he cannot by contract throw off the essential duties of his employment as a common carrier.²⁴

Such a limitation is rarely imposed in express terms, but is sought to be done indirectly in various ways. Thus, bills of lading usually contain clauses to the effect that certain persons employed to select, load or unload cars for the shipment of goods or live-stock shall, while so engaged, be deemed to be the employees of the shipper and not of the carrier; or that the shipper shall undertake to select the cars and load them at his own risk. But the courts very properly hold such stipulations invalid as being mere devices on the part of the carrier to exempt himself from liability for the acts of those who are, in fact, his own servants.

The question whether those who select and load cars are the employees of the carrier or of the shipper, is one of fact, and must, as we have seen, be established by the evidence and not by the agreement of the parties.²⁵

The Supreme Court of Texas, in *Mo. Pac. Ry. Co. v. Ivy*,²⁶ construing such a clause in a bill of lading for live-stock, said:

"It is a pretense, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relation of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true, does not make it so."

Then, too, the carrier's duty to employ competent servants, and

²³ See in accord, *Liverpool &c. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *Hinkle v. So. Ry. Co.*, 126 N. C. 932; *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

²⁴ *Liverpool &c. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397; *Knott v. Botany Worsted Mills*, 179 U. S. 69; *N. & W. R. Co. v. Harman*, 91 Va. 601; *Code of Virginia*, sec. 1296.

²⁵ *Railroad Co. v. Pratt*, 89 U. S. 123; *Railroad Co. v. Cromwell*, 98 Va. 227; *Chicago &c. Ry. v. Davis*, 159 Ill. 53.

²⁶ 71 Texas, 409.

to select suitable cars and properly equip them, is a non-assignable one.

A stipulation that the owner of live-stock shall give notice of his claim for loss or injury before the stock is removed from the place of delivery, or mingled with other stock, is valid as a reasonable protection of the carrier against the fraud of the shipper;²⁷ but the injury must be such as would be apparent at the time of the unloading,²⁸ and it must be practicable to give the notice under the circumstances. Hence, where the carrier has no agent at the point of delivery, notice will be dispensed with as an unreasonable requirement.²⁹

Stipulations against loss by fire, breakage, delay, etc., and, in case of animals, against liability for injury or death from overloading, heat, suffocation, etc., are valid if the injury or loss be not attributable to the negligence of the carrier or his servants; otherwise such stipulations are void.³⁰

A stipulation that notice of any claim for loss or damage shall be given within a prescribed time, is valid, provided the length of time is not unreasonably short; but the bill of lading should specify the name of the person to whom the notice is to be given, unless his name and address be known to the shipper.³¹

The same is true of stipulations limiting the time in which suit shall be brought,³² but if the carrier, by negotiations for settlement or otherwise, so act as to afford a reasonable belief on the part of the shipper that a settlement will be made without suit, he will be estopped to invoke the limitation.³³

LIMITATION OF AMOUNT OF RECOVERY IN CASE OF LOSS OR INJURY TO GOODS.

The right of the carrier to limit the extent of his liability where the loss or injury is not the result of negligence, is plain; but

²⁷ *Wood v. So. Ry. Co.*, 118 N. C. 1056; *The St. Hubert*, 107 Fed. 727; *Railway Co. v. Harwell*, 91 Ala. 340; *Owen v. L. & N. R. Co.*, 87 Ky. 626.

²⁸ *Harned v. Railroad*, 51 Mo. App. 482; *Railway Co. v. Stanley*, 89 Texas, 42.

²⁹ *N. & W. R. Co. v. Reeves*, 97 Va. 284; *Baxter v. Railroad Co.*, 165 Ill. 78; *Railroad Co. v. Harris*, 87 Texas, 166.

³⁰ *Ginn v. Transit Co.*, 29 C. C. A. 521; *Railroad Co. v. Gatewood*, 79 Tex. 69; *Railroad Co. v. Trawick*, 68 Tex. 314.

³¹ *So. Exp. Co. v. Caldwell*, 88 U. S. 264; *Wood v. So. Ry. Co.*, 118 N. C. 1016; *N. & W. R. Co. v. Reeves*, *supra*.

³² *Va. F. & M. Ins. Co. v. Aiken*, 82 Va. 424; *Same v. Wells*, 83 Va. 736.

³³ *Ginn v. Transit Co.*, 29 C. C. A. 521; *Railroad Co. v. Trawick*, 79 Tex. 69; *Railroad Co. v. Gatewood*, 68 Tex. 314.

where negligence is the cause of the loss, there is a considerable conflict of authority.

A majority of the State courts, including those of Virginia, following the lead of *Hart v. Penn. R. R. Co.*,³⁴ hold that a stipulation in a bill of lading as to the value of the property shipped, if fairly and honestly made, will be upheld, even though the loss was due to the carrier's negligence. Such an agreement is in the nature of a contract for liquidated damages; and, as the rate of carriage is fixed, to some extent, according to the value of the goods, the shipper ought not to be allowed to disregard the agreement after the loss, and thus expose the carrier to a risk greater than it was contemplated he should assume.

Nevertheless, such a limitation must not be an arbitrary imposition, but a reasonable protection of the carrier against the shipper's fraud. Accordingly, it has been held that where the limitation is a mere attempt on the part of the carrier to arbitrarily limit his liability for a loss due to his own negligence, it is unreasonable and void.³⁵

As to what is the proper test by which to distinguish an agreed limitation of value from an arbitrary restriction of the amount of recovery, there appears to be a great diversity of opinion. Some of the cases distinguish between a stipulation providing that the amount of recovery *shall not exceed* a certain specified limit, and one in which the value of the article is agreed to be a certain sum. In the latter case, it has been said that the stipulation being such that no evidence of a greater or smaller value is admissible, it is in the nature of an agreement for liquidated damages and is valid. But, if the agreement be that the value *shall not exceed* a specified sum, then the true value may be below the maximum value agreed upon and hence a subject of proof; consequently, the agreement is not one for liquidated damages, and the stipulation is void as an arbitrary limitation imposed by the carrier.³⁶

Other authorities distinguish between cases where the valuation is made by the shipper and where it is made by the carrier, holding that where it is made by the carrier, it is an arbitrary attempt to

³⁴ 112 U. S. 331; *R. & D. R. Co. v. Payne*, 86 Va. 481.

³⁵ *The Kensington*, 188 U. S. 203; *R. & D. R. R. Co. v. Payne*, 86 Va. 481.

³⁶ *Conover v. Pac. Exp. Co.*, 40 Mo. App. 31; *Calderon v. Atlas S. S. Co.*, 16 C. C. A. 332; *Railroad Co. v. Sowell*, 90 Tenn. 17; *Eels v. Railroad*, 52 Fed. 903.

limit his responsibility; whereas, if made by the shipper, it is a contract of valuation.³⁷

Still another line of cases test the validity of such a limitation by the consideration whether or not the value stated in the bill of lading is disproportionate to the real value of the property shipped, holding that the rule prohibiting a disproportionate valuation is founded on considerations of public policy, the question being, not what the parties knew or intended, but whether the effect of the stipulation is or is not injurious to the public as tending to decrease the diligence of the carrier.³⁸

It would seem from the foregoing that, while there is a distinction between a merely arbitrary limitation of the amount of the recovery by the carrier and an agreed valuation by both the carrier and the shipper as a basis for liability in case of loss or damage, yet the authorities are in conflict as to what is the proper test for determining whether a given stipulation is the one or the other.

However this may be, it is well settled that, if the provision of the bill of lading limiting the value of the article shipped provide that it shall be a certain sum, *unless a greater value be expressed or declared*; or, if it be so worded as to make it the duty of the shipper to disclose, rather than of the carrier to demand, the true value, then the silence of the shipper as to the true value will be sufficient to make the limitation valid, provided the carrier is ignorant of the true value or the true value is not apparent.³⁹

It seems to be settled that, where a statute prohibits a common carrier from limiting his liability, he cannot by contract fix the amount of recovery in case of loss or injury at less than the actual damages sustained.⁴⁰

But in Virginia it is held that our statute prohibiting *exemption* from liability for negligence does not invalidate an agreement *limiting* liability where it is fairly and freely entered into.⁴¹

JOHN G. HAYTHE.

Lynchburg, Va.

³⁷ *Doan v. Railway Co.*, 38 Mo. 408; *contra*, *Hart v. Railroad*, *supra*.

³⁸ *Railway Co. v. Henlein*, 52 Ala. 606; *So. Railway Co. v. Jones* (Ala.), 31 South. 501; *Railway Co. v. Hartwell*, 91 Ala. 340.

³⁹ *Kallman v. U. S. Exp. Co.*, 3 Kan. 205; *Magnin v. Dinsmore*, 70 N. Y. 410; *Overland Mail & Co. v. Carroll*, 7 Colo. 43; *Orndoff v. Adams Exp. Co.*, 66 Ky. 194; *contra*, *Alair v. N P. R. R. Co.*, 53 Minn. 160.

⁴⁰ *Hart v. Railroad*, 69 Ia. 485; *Railway Co. v. Parrish*, 18 Tex. Civ. App. 130.

⁴¹ Code of Virginia, sec. 1296; *R. & D. R. R. Co. v. Payne*, 86 Va. 481.